

09-08-2003 12:51pm From-

T-336 P.026/030 F-699

ZAKARA ROSS, et al. :
 :
 v. :
 :
 AMERICAN HOME PRODUCTS :
 CORPORATION, NOW KNOWN AS :
 WYETH CORPORATION, et al. : CIVIL ACTION NO. 03-20173
 :
 _____ :

PRETRIAL ORDER NO. 2946

AND NOW, this 30th day of July, 2003, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

- (1) the motion of plaintiffs in Weaver, et al. v. American Home Products Corp., et al., Civ. A. No. 03-20153 ("Weaver") to remand to the Superior Court of Fulton County, Georgia is DENIED;
- (2) all claims in Weaver against defendants Rugby Laboratories, Inc., Anthony D. Adams, Robin W. Jones, Avery T. Lanius, Robert L. Scott and John A. Molnar are DISMISSED;
- (3) the claims of the New Jersey plaintiff, Jesus Delgado, against Wyeth in Weaver are DISMISSED without prejudice;
- (4) the claims of the remaining non-Georgia plaintiffs, Marc Haug, Don Herrly, Paulette Neva, Deborah McCann, Helen Lang, P. Susan Kollman, Cyndi Zueger, Debra Wold, Carol McConnell, Edith Sailer, Jill Rarick, Arlene Huff, Merriann Isaac, Sharlene McDearman, Suzanne Wilson, Ruth Samuels, Kathryn Perkins, Patricia O'Neil, Jerry Chavez and Carol Galliett, against Wyeth in Weaver are DISMISSED without prejudice;

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(5) the motion of plaintiffs in Neason, et al. v. American Home Products Corp., et al., Civ. A. No. 03-20154 ("Neason") to remand to the Superior Court of Fulton County, Georgia is DENIED;

(6) all claims in Neason against defendants Rugby Laboratories, Inc., Anthony D. Adams, Robin W. Jones, Avery T. Lanius, Robert L. Scott and John A. Molnar are DISMISSED;

(7) the claims of the New Jersey plaintiff, Iris Rodriguez, against Wyeth in Neason are DISMISSED without prejudice;

(8) the claims of the remaining non-Georgia plaintiffs, Candyce Jaramillo, Margaret Duncan, Robert Rohrer, Kathryn Rasmussen, Leanna Mittleder, Rebecca Hoselton, Sheila Braunberger, Evelyn Helmer, Teresa Potter, Julie Sailor, Elizabeth Anderson, Sandra Sommers, Traci Bertsch, Trude Hendrickson and Brenda Nygard against Wyeth in Neason are DISMISSED without prejudice;

(9) the motion of plaintiffs in Carter, et al. v. American Home Products Corp., et al., Civ. A. No. 03-20158 ("Carter") to remand to the Superior Court of Fulton County, Georgia is DENIED;

(10) all claims in Carter against defendants Rugby Laboratories, Inc., Anthony D. Adams, Robin W. Jones, Avery T. Lanius, Robert L. Scott and John A. Molnar are DISMISSED;

(11) the claims of the New Jersey plaintiff, Mary Ann Panek, against Wyeth in Carter are DISMISSED without prejudice;

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(12) the claims of the remaining non-Georgia plaintiffs, Lisa Baumler, Deborah Lee, Annamarie Herrly, Pamela Fladeland, Norma Rudel, Ardis Bahr, Jody Nelson, Janet Meyer, Patricia Huff, Gayle Weatherston, Jeffery Huff, Ilene Allen, Daniel Jetty, Alicia Myer, Cheryl Smith, Mary Velasquez, Susan Duncan, Marita Rollins, Merlene Robertson, Brenda Jorgensen and Nanette Orton against Wyeth in Carter are DISMISSED without prejudice;

(13) the motion of plaintiffs in Parker, et al. v. American Home Products Corp., et al., Civ. A. No. 03-20165 ("Parker") to remand to the Superior Court of Fulton County, Georgia is DENIED;

(14) all claims in Parker against defendants Rugby Laboratories, Inc., Anthony D. Adams, Robin W. Jones, Avery T. Lanius, Robert L. Scott and John A. Molnar are DISMISSED;

(15) the claims of the New Jersey plaintiff, Janet Crews, against Wyeth in Parker are DISMISSED without prejudice;

(16) the claims of the remaining non-Georgia plaintiffs, Tracy Lee, Lynda Scholin, Jeri Giefer, Mary Rutten, Penny Taylor, Deborah Figarelle, Leah Miller, John Jensen, Geraldine Cottrell, Wayne Stokka, June Hoffman, Paula Martin, Lisa Miller, Dana Stockert, Wendy Fultz, Susan Lindemoen, Luann Larson, Karen Jackson, Pamela Skogen and Mary Hall against Wyeth in Parker are DISMISSED without prejudice;

(17) the motion of plaintiffs in Cole, et al. v. American Home Products Corp., et al., Civ. A. No. 03-20171

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("Cole") to remand to the Superior Court of Fulton County, Georgia is DENIED;

(18) all claims in Cole against defendants Rugby Laboratories, Inc., Anthony D. Adams, Robin W. Jones, Avery T. Lanius, Robert L. Scott and John A. Molnar are DISMISSED;

(19) the claims of the New Jersey plaintiff, Stefanie Bounassi, against Wyeth in Cole are DISMISSED without prejudice;

(20) the claims of the remaining non-Georgia plaintiffs, Cheryl Hoban, Geraldine Lies, Olinda McCabe, Carrie Nelson-Hartman, Vicky Ortiz, Lisa Anderson, Mary Bergquist, Wendy Brovold, Gail Davidson, Cheryl Gumke, Chandace Woehlhauff, Kristy Kongsli, Karen Olson, Karen Ramsey, Bonnie Sandeen, Bonnie Simmons, Janice Strande, Dedriene Taylor, Terri Hams, Marilyn Aiken, Betty J. Montgomery, Patricia Bailey-Stuhr and Diane Talbot against Wyeth in Cole are DISMISSED without prejudice;

(21) the motion of plaintiffs in Ross, et al. v. American Home Products Corp., et al., Civ. A. No. 03-20173 ("Ross") to remand to the Superior Court of Fulton County, Georgia is DENIED;

(22) all claims in Ross against defendants Rugby Laboratories, Inc., Anthony D. Adams, Robin W. Jones, Avery T. Lanius, Robert L. Scott and John A. Molnar are DISMISSED;

(23) the claims of the New Jersey plaintiff, Doris Towson, against Wyeth in Ross are DISMISSED without prejudice; and

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(24) the claims of the remaining non-Georgia plaintiffs, Mary Ehni, Delemma Greywater, Clinton Sauter, Margaret Schwab, Sue Nieland, Becky Meek, Richard Nicklos, Mary Tintes, Susan Olson-Edwardson, Doug Waters, Colleen Bergeron, Sheri Coleman, Holly Anderson, Enid Haslam and Kelly Hoss against Wyeth in Ross are DISMISSED without prejudice.

BY THE COURT:

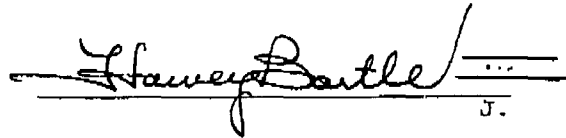

J.

EXHIBIT 3

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US DISTRICT COURT EDPA

P.02/15

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
-----	:	
LISA BISHOP, et al.	:	CIVIL ACTION NO. 03-20601
v.	:	
TERRY LOWE, MD., et al.	:	
	:	
KAREN BATES, et al.	:	CIVIL ACTION NO. 03-20630
v.	:	
DWALIA SOUTH, et al.	:	
	:	
GAITHER BELL, et al.	:	CIVIL ACTION NO. 03-20584
v.	:	
DONALD BLACKWOOD, M.D., et al.	:	
	:	
PAM HARKINS, et al.	:	CIVIL ACTION NO. 03-20588
v.	:	
PATRICK MCLAIN, M.D., et al.	:	

FILED MAY 18 2004

MEMORANDUM AND PRETRIAL ORDER NO. 3536

Bartle, J.

May 18, 2004

Before the court are the motions of numerous class members in four separate actions to remand to the appropriate Mississippi state courts their claims against: (1) Wyeth¹; (2) in-state physicians who have prescribed Wyeth's diet drugs Pondimin and/or Redux for plaintiffs; (3) Indevus Pharmaceuticals, a manufacturer of dexfenfluramine; (4) two named

1. Wyeth was previously known as American Home Products Corporation ("AHP").

sales representative defendants; and (5) John Does 1-25, who appear to be anonymous Mississippi resident sales representatives of Wyeth. The state court actions were captioned Lisa Bishop, et al. v. Terry Lowe, M.D., et al. (Miss. Cir. Ct. Jones County, filed Dec. 27, 2002); Karen Bates, et al. v. Dwalia South, et al. (Miss. Cir. Ct. Lincoln County, filed Dec. 30, 2002); Gaither Bell, et al. v. Donald Blackwood, M.D., et al. (Miss. Cir. Ct. Sunflower County, filed Dec. 27, 2002); and Pam Harkins, et al. v. Patrick McLain, M.D., et al. (Miss. Cir. Ct. Bolivar County, filed Dec. 23, 2002).

Plaintiffs in these actions, with the exceptions of Pam Harkins, Sandra Naramore, and Peggy Brooks, have exercised their right of intermediate or back-end opt-out under the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in Brown v. American Home Products Corporation, CIV. A. No. 99-20593 (E.D. Pa. Aug. 28, 2000) (Pretrial Order ("PTO") No. 1415), which encompassed persons who ingested Wyeth's diet drugs Pondimin and Redux. See e.g., Settlement Agreement at § IV(A), (B), and (D)(4).² Under the Settlement Agreement, those who have exercised an intermediate or back-end opt-out may sue Wyeth for

2. Wyeth alleges that plaintiffs Pam Harkins and Sandra Naramore exercised initial opt-out rights and that plaintiff Peggy Brooks exercised the accelerated implementation option under the Settlement Agreement. Plaintiffs' differing opt-out status has no bearing on our decision regarding these plaintiffs' respective motions to remand as detailed throughout this order.

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compensatory damages in the tort system rather than obtain benefits from the AHP Settlement Trust.

Plaintiffs filed their complaints in the Circuit Court of Jones County, Lincoln County, Sunflower County and Bolivar County, Mississippi respectively, in December, 2002. Wyeth timely removed these actions to the United States District Court for the Southern District of Mississippi, asserting that plaintiffs fraudulently joined the in-state physician and in-state sales representative defendants in an attempt to defeat federal diversity. Thereafter, plaintiffs moved to remand these actions under 28 U.S.C. § 1447(c). The Mississippi federal courts deferred ruling on plaintiffs' motions, and the cases were then transferred to this court as part of MDL 1203, the mass tort litigation involving Wyeth's diet drugs. No federal claims for relief are alleged.

I.

In brief summary, plaintiffs, all of whom are citizens of Mississippi, filed suits for injuries sustained as a result of their use of the diet drugs Pondimin and/or Redux. The defendant Wyeth, the manufacturer of Pondimin and Redux, and Indevus Pharmaceuticals are parties of diverse citizenship from the plaintiffs. The defendant physicians who prescribed Pondimin and/or Redux to plaintiffs in these matters and the defendant

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sales representatives who allegedly promoted Pondimin and Redux are purportedly citizens of Mississippi.

Plaintiffs maintain that remand is appropriate because complete diversity does not exist as required under 28 U.S.C. § 1332(a). Wyeth counters that the non-diverse physicians in these matters were fraudulently joined because the applicable two-year statute of limitations bars plaintiffs' claims against these non-diverse defendants.³ See MISS. CODE ANN. § 15-1-36 (West 2003). As to the claims against the in-state sales representative defendants, Wyeth asserts that plaintiffs' strict liability and negligence claims fail because sales representatives are not actually "sellers" of goods but merely agents of Wyeth. In addition, Wyeth argues that pursuant to the learned intermediary doctrine, the sales representatives were under no duty to warn plaintiffs about the risks associated with the ingestion of diet drugs. Thus, Wyeth maintains, plaintiffs' claims against these non-diverse defendants should be disregarded for purposes of determining diversity of citizenship of the parties. Plaintiffs respond that the statute of limitations has not expired against the in-state physicians because they

3. The statute of limitations is not an issue in plaintiffs' claims against Wyeth, which has waived its right to assert the statute of limitations defense in return for the plaintiffs giving up their right to sue Wyeth for "punitive, exemplary, or multiple damages." Settlement Agreement § IV.D.3.c; see PTO No. 2625 and PTO No. 2680.

discovered their injuries less than two years prior to filing their claims. With regard to the claims against the in-state sales representative defendants, plaintiffs assert that the sales representative defendants are proper parties in these matters because they acted as agents of Wyeth and distributed diet drugs with knowledge of their dangerous propensities.

II.

This court addressed many of the same issues presented by plaintiffs' remand motions in PTO No. 3281 in French, et al. v. Wyeth, et al., CIV. A. No. 03-20353 (E.D. Pa. Feb. 18, 2004), which is also part of the nationwide diet drug litigation. In French, we laid out in detail the standards for removal based on diversity jurisdiction and fraudulent joinder. See PTO No. 3281 at 2-4. Because we examined the same legal issues as they applied to nearly identical facts in French, we need not revisit them here.

III.

With regard to the physician defendants in these actions, the key issue is whether they have been fraudulently joined solely for the purpose of destroying diversity of citizenship and preventing removal. For the same reasons set forth in French, we find "no reasonable basis in fact or colorable ground" supporting plaintiffs' claims against the in-

state physicians. Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990).

As discussed in greater detail in French, plaintiffs' claims against the in-state physicians are time barred because their complaints were clearly filed outside the two year statute of limitations. See Miss. CODE. ANN. § 15-1-36. The statute began running, "when the plaintiff[s] should have reasonably known of some negligent conduct, even if the plaintiff[s did] not know with absolute certainty that the conduct was legally negligent." Sarris v. Smith, 782 So. 2d 721, 725 (Miss. 2001). As we found in French, the publicity surrounding the withdrawal of diet drugs put plaintiffs on inquiry notice of their claims in September, 1997 or, at the very latest by March, 2000, at the height of Wyeth's extensive media campaign.

In light of the massive publicity concerning the health risks associated with the use of diet drugs and the determination by this court after a full hearing that diet drug injuries are not latent, we find that plaintiffs in the exercise of reasonable diligence should have discovered their injuries at the very latest by March, 2000. Thus, they needed to have filed their complaints by March, 2002. Because they did not do so until December, 2002, their claims against the in-state physicians are clearly time-barred.

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In support of her contention that her claims are not time barred, Sandra Naramore, a party in Harkins, et al., relies on the results of her December, 2002 echocardiogram, which allegedly revealed that she has valvular heart injury. Ms. Naramore, however, does concede that the latest point in time she could have ingested diet drugs was in 1997 when they were removed from the market. Further, she does not dispute that the results of her August, 2000 echocardiogram indicate that she had no heart valve injury at that time. Accordingly, the only logical basis for her position is that her injuries were latent.

This court also addressed the issue of latency in French. There, we referred to this court's determination in PTO No. 1415 that Pondimin and Redux did not cause latent heart valve injuries but rather that any injury occurred at or near the time of last use. This decision was made after receiving extensive evidence on the latency issue at the fairness hearing in connection to the Settlement Agreement. In the August 28, 2000 Order approving the Settlement Agreement, Judge Bechtle stated: "[t]he absence of a latency period between the ingestion of [the diet drug] and the development of clinically detectable [heart disease] is ... confirmed by a number of studies ... , [each of which finds] that there was no emergence of new disease after some latency period." PTO No. 1415 at 46.

Accordingly, for the same reasons set forth in French, we find that the plaintiff Sandra Naramore is collaterally estopped from re-litigating the issue of latency.

IV.

Plaintiffs also assert that the statute of limitations is tolled against the physician defendants because the physicians have fraudulently concealed facts which would have alerted plaintiffs to the dangers associated with the use of diet drugs. We previously addressed this same issue in Cockrell, et al. v. Wyeth, et al. (E.D. Pa. Mar. 9, 2004). Where fraud or concealment of tortious conduct is alleged, Mississippi law specifies that "the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered." MISS. CODE ANN. § 15-1-36(2)(b).

As in Cockrell, we find that plaintiffs' complaints are devoid of facts, allegations, or information which would suggest that an affirmative act of concealment was perpetrated by the physician defendants to conceal the plaintiffs' alleged injuries. Thus, there is "no reasonable basis in fact or colorable ground" on which plaintiffs can invoke the fraudulent concealment saving provision to toll the statute of limitations because plaintiffs have failed to set forth the conduct that constitutes fraudulent concealment under Mississippi law. Boyer, 913 F.2d at 111; see

also Reich v. Jesco, Inc., 526 So.2d 550, 552 (Miss. 1998) (citations omitted).⁴

Accordingly, we find that Wyeth has met its heavy burden of showing that the in-state physician defendants are fraudulently joined.

V.

Plaintiffs also assert that the statute of limitations defense is not applicable to the physician defendants under the Settlement Agreement. We addressed this issue in PTO No. 3391, in Bobbie Amiker, et al. v. Wyeth, et al., CIV. A. No. 03-20343 (E.D. Pa. Apr. 2, 2004). For the same reasons stated in Amiker, these defendants retain the benefit of the statute of limitations defense pursuant to § IV.D.3.c of the nationwide Settlement Agreement. See PTO No. 3391, at 7-9.

VI.

Plaintiffs also bring claims in negligence and strict liability against Wyeth's in-state sales representatives Forest Bratley and Susan Bodney. Wyeth argues that these defendants are

4. Plaintiffs assert that this court should remand their respective actions because their fraud claims are governed by the three year statute of limitations codified in Miss. CODE ANN. § 15-1-49. We disagree. This statute provides a three year limitations period for "[a]ll actions for which no other period of limitation is prescribed." Miss. CODE ANN. § 15-1-49. As noted above, plaintiffs have failed to establish a cause of action in fraud. Plaintiffs' claims against the physicians are clearly governed by the two-year statute of limitations codified in Miss. CODE ANN. § 15-1-36.

fraudulently joined. We note first that there is no indication in plaintiffs' complaints that any of the plaintiffs, or any of the plaintiffs' doctors, received any drugs from these sales representative defendants. Further, any allegations of misrepresentation or fraud fall short of what is required under both federal and Mississippi law. See Fed. R. Civ. P. 9(b); Miss. R. Civ. P. 9(b); Allen v. Mac Tools Inc., 671 So.2d 636, 642 (Miss. 1996); Brabham v. Brabham, 483 So. 2d 341, 342 (Miss. 1986).

The Mississippi courts have clearly decided in the prescription drug context that the duty to warn does not extend to sales representatives. See e.g., Johnson v. Parke-Davis, 114 F. Supp. 2d 522, 524-25 (S.D. Miss. 2000). In addition, under Mississippi law, sales representatives are not "sellers," but rather employees of the businesses which are the sellers. McCurtis v. Dolgencorp, Inc., 968 F. Supp. 1158, 1160-61 (S.D. Miss. 1997). As such, the employees are not liable for failure to warn. See id. There is "no reasonable basis in fact or colorable ground supporting the claim against" the sales representative defendants. Bover, 913 F.2d at 111; see also Johnson, 114 F. Supp. 2d at 524-25; In re Rezulin Prods. Liab. Litig., 133 F. Supp. 2d 272, 288-90 (S.D.N.Y. 2001).

VII.

Finally, plaintiffs bring claims against John Does 1-25, who appear to be anonymous in-state sales representatives of Wyeth. Plaintiffs purportedly name these unidentified defendants in an effort to defeat diversity. However, the removal statute provides that "the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(a). Thus, for the purposes of determining whether complete diversity exists so that these actions may remain in federal court, the citizenship of unidentified defendants is irrelevant.

VIII.

Wyeth has clearly met its heavy burden of showing that these defendants are fraudulently joined. Accordingly, we will deny the motions of the plaintiffs to remand these actions to the Mississippi state courts and will dismiss the complaints as to the in-state physicians and sales representative defendants.⁵

5. We are only dismissing the claims against those defendant physicians who appear on the MDL 1203 docket in these actions.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
-----	:	
LISA BISHOP, et al.,	:	CIVIL ACTION NO. 03-20601
v.	:	
TERRY LOWE, MD., et al.,	:	
	:	
KAREN BATES, et al.	:	CIVIL ACTION NO. 03-20630
v.	:	
DWALIA SOUTH, et al.	:	
	:	
GAITHER BELL, et al	:	CIVIL ACTION NO. 03-20584
v.	:	
DONALD BLACKWOOD, M.D., et al.,	:	
	:	
PAM HARKINS, et al.	:	CIVIL ACTION NO. 03-20588
v.	:	
PATRICK MCLAIN, M.D., et al.	:	

PRETRIAL ORDER NO. 3536

AND NOW, this 18th day of May, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of plaintiffs in Lisa Bishop, et al. v. Terry Lowe, M.D., et al., CIV. A. No. 03-20601 (E.D. Pa.) to remand to the Circuit Court of Jones County, Mississippi is DENIED;

(2) all claims in Bishop against Terry R. Lowe, Bruce Pruett, Antonio Janchuck, Vance Z. Baucum, Jr., Adron Keith Lay,

Phillip Rogers, Laurence L. Dennis, David Greenshaw, Jay McDuffy, Unknown Patel, Thomas Pitt, Van De Castle, D.R. Patel, Unknown Alexander, Robert Tate, Robert L. Ray, Unknown Lambert, Ernest Reeves, Herbert H. Hicks, Forest Bratley, and Susan Bodney are DISMISSED;

(3) the motion of plaintiffs in Karen Bates, et al. v. Wyeth, et al., CIV. A. No. 03-20630 (E.D. Pa.) to remand to the Circuit Court of Lincoln County, Mississippi, is DENIED;

(4) all claims in Bates against defendants, Dwalia S. South, Louis Owens, Burton Friedman, F. Lee Neal, Jr., J.J. Purdy, James Leak, Forest Bratley, and Susan Bodney are DISMISSED;

(5) the motion of plaintiffs in Gaither Bell, et al. v. Donald Blackwood, M.D., et al., CIV. A. No. 03-20584 (E.D. Pa.) to remand to the Circuit Court of Sunflower County, Mississippi, is DENIED;

(6) all claims in Bell against defendants, Donald J. Blackwood, M.D., Victor Anazia, M.D., Dr. "Unknown" Moore, Mark Allen, M.D., Jasper D. Moore, M.D., James Riser, M.D., David Moody, M.D., W.H. Rose, M.D., Charles A. Ozborn, M.D., D.L. Bolton, M.D., Steve Morris, M.D., Patrick G. McLain, M.D., Forest Bratley, and Susan Bodney are DISMISSED;

(7) the motion of plaintiffs in Pam Harkins, et al. v. Patrick McLain, M.D., et al., CIV. A. No. 03-20588 (E.D. Pa.) to

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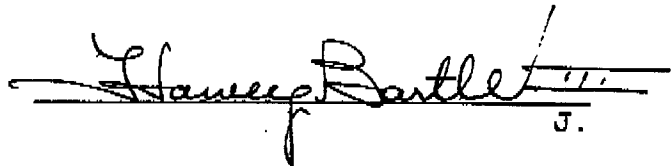
US DISTRICT COURT EDPA

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remand to the Circuit Court of Bolivar County, Mississippi, is
DENIED; and

(8) all claims in Harkins against defendants, Billy
Sollie, for the Estate of Patrick McLain, M.D., Manoj Rawal,
M.D., Forest Bratley, and Susan Bodney are DISMISSED.

BY THE COURT:


J.

ENTERED
MAY 18 2004
CLERK OF COURT

EXHIBIT 4

FEB-25-2004 17:53

US DISTRICT COURT EDPA

P.22/40

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
-----	:	
JOYCE ANN ALLEN, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
BRENDA BARNETT, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
SARAH BROOKS, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
LORETTA GRANT, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
DAVID PICKERING, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
BETTY RAMSHUR, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
ROY SIMMONS, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
TRINA WATERS, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
ANTHONY WATSON, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
DOROTHY WINTERS, et al.	:	
v.	:	
WYETH, et al.	:	
	:	
PAUL WOODCOCK, et al.	:	
v.	:	
WYETH, et al.	:	

FILED FEB 24 2004

MDL DOCKET NO. 1203

CIVIL ACTION NO. 03-20310

CIVIL ACTION NO. 03-20239

CIVIL ACTION NO. 03-20318

CIVIL ACTION NO. 03-20330

CIVIL ACTION NO. 03-20302

CIVIL ACTION NO. 03-20333

CIVIL ACTION NO. 03-20319

CIVIL ACTION NO. 03-20323

CIVIL ACTION NO. 03-20296

CIVIL ACTION NO. 03-20170

ENTERED

CIVIL ACTION NO. 03-20273

FEB 25 2004

CLERK OF COURT

FEB-25-2004 17:53

US DISTRICT COURT EDPA

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JAMIE WOODS, et al. :
 v. : CIVIL ACTION NO. 03-20272
 WYETH, et al. :
 _____ :

MEMORANDUM AND PRETRIAL ORDER NO. 3305

Bartle, J.

February 24, 2004

Before the court are the motions of numerous class members in twelve separate actions to remand to the appropriate Mississippi state courts their actions against defendants Wyeth¹ and the physicians who have prescribed Wyeth's diet drugs Pondimin and/or Redux for them. The state court actions were captioned Joyce Ann Allen, et al. v. Wyeth, et al., (Miss. Cir. Ct. Copiah County filed Nov. 1, 2002); Sarah Brooks, et al. v. Wyeth, et al., (Miss. Cir. Ct. Sharkey County filed Nov. 6, 2002); Brenda Barnett, et al. v. Wyeth, et al., (Miss. Cir. Ct. Sunflower County filed Nov. 6, 2002); Loretta Grant, et al. v. Wyeth, et al., (Miss. Cir. Ct. Holmes County filed Nov. 5, 2002); David Pickering, et al. v. Wyeth, et al., (Miss. Cir. Ct. Jones County filed Nov. 6, 2002); Betty Ramshur, et al. v. Wyeth, et al., (Miss. Cir. Ct. Jones County filed Nov. 6, 2002); Roy Simmons, et al. v. Wyeth, et al., (Miss. Cir. Ct. Claiborne County filed Nov. 1, 2002); Trina Waters, et al. v. Wyeth, et al., (Miss. Cir. Ct. Holmes County filed Nov. 5, 2002); Anthony Watson, et al. v. Wyeth, et al., (Miss. Cir. Ct. Hinds County filed Nov. 15, 2002); Dorothy Winters, et al. v. Wyeth, et al.,

1. Wyeth was previously known as American Home Products Corporation ("AHP").

(Miss. Cir. Ct. Holmes County filed June 21, 2002); Paul Woodcock, et al. v. Wyeth, et al., (Miss. Cir. Ct. Humphreys County filed Nov. 5, 2002); and Jamie Woods, et al. v. Wyeth, et al., (Miss. Cir. Ct. Sunflower County filed Nov. 5, 2002).

According to Wyeth, the plaintiffs in these actions have exercised their right of intermediate opt-out under the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in Brown v. American Home Products Corporation, CIV. A. No. 99-20593 (E.D. Pa. Aug. 28, 2000) ("Pretrial Order ("PTO") No. 1415"), which encompassed persons who ingested Wyeth's diet drugs Pondimin and Redux. See e.g., Settlement Agreement at § IV(A), (B), and (D)(4). Under the Settlement Agreement, those who have exercised an intermediate or back-end opt-out may sue Wyeth for compensatory damages in the tort system rather than obtain benefits from the AHP Settlement Trust. Unlike initial opt-outs, these plaintiffs were class members at the time of the approval of the class action settlement and continue to be so even though they now have separate lawsuits pending.

There are 256 plaintiffs in these twelve actions, and they are all represented by the same counsel.² Their motions for remand are before the undersigned as the transferee judge in MDL 1203, the mass tort litigation involving Wyeth's diet drugs commonly known as fen-phen. No federal claim for relief is

2. Some plaintiffs are derivative claimants suing for loss of consortium.

alleged. Because these motions present nearly identical legal and factual issues, we will address them together.

I.

In brief summary, plaintiffs, all citizens of the state of Mississippi, filed suits for injuries sustained as a result of their use of the diet drugs known as Pondimin and/or Redux. The defendant Wyeth, the manufacturer of Pondimin and Redux, is a party of diverse citizenship from the plaintiffs. The defendant physicians who prescribed Pondimin and/or Redux to plaintiffs are alleged to be citizens of Mississippi.

Plaintiffs originally filed their complaints in Mississippi Circuit Courts in June or November, 2002, more than five years after fen-phen was withdrawn from the market in September, 1997. Wyeth timely removed the actions to the United States District Court for the Southern District of Mississippi. The Mississippi federal court deferred ruling on plaintiffs' motions, and the cases were then transferred to this court as part of MDL 1203.

The plaintiffs maintain that remand is appropriate because complete diversity does not exist as required under 28 U.S.C. § 1332(a). Wyeth counters that the non-diverse physicians were fraudulently joined because the applicable two-year statute of limitations bars plaintiffs' claims against these non-diverse defendants.³ See MISS. CODE ANN. § 15-1-36 (West

3. The statute of limitations is not an issue in plaintiffs' claims against Wyeth, which has waived its right to assert the
(continued...)

2003). Thus, Wyeth argues, plaintiffs' claims against these non-diverse defendants should be disregarded for purposes of determining diversity of citizenship of the parties. Plaintiffs respond that the statute of limitations has not expired because they discovered their injuries less than two years prior to filing their motions for judgment against the non-diverse defendants.

II.

This court addressed the identical issues presented by plaintiffs' remand motions in PTO No. 3281 in French, et al. v. Wyeth, et al., CIV. A. No. 03-20353 (E.D. Pa. Feb. 18, 2004), which is also part of the nationwide diet drug litigation. In French, we laid out in detail the standards for removal based on diversity jurisdiction and fraudulent joinder. See PTO No. 3281 at 2-4. Because we examined the same legal issues as they applied to nearly identical facts in French, we need not revisit them here.

III.

The key issue in these cases, as in French, is whether the prescribing physicians, all purportedly Mississippi citizens, were fraudulently joined as defendants for the purpose of destroying diversity of citizenship and preventing removal.

3. (...continued)
statute of limitations defense in return for the plaintiffs giving up their right to sue Wyeth for "punitive, exemplary, or multiple damages." Settlement Agreement § IV.D.3.c; see PTO No. 2625 and PTO No. 2680.

Plaintiffs have brought claims for medical negligence against all of these non-diverse defendants.

Wyeth argues that plaintiffs' complaints do not state colorable claims against these defendants because plaintiffs' claims are barred by the Mississippi statute of limitations. The statute provides in relevant part:

For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

MISS. CODE ANN. § 15-1-36(1) (emphasis added). For any claim accruing on or after July 1, 1998, the statute of limitations is the same for all relevant purposes.⁴

In French, we set forth the standard for when an action "accrues" under Mississippi law. See PTO No. 3281 at 6. In short, an action accrues when a patient can reasonably be held to have knowledge of the injury itself, cause of injury, and the conduct of the medical practitioner. Fortenberry v. Mem'l Hosp. At Gulfport, Inc., 676 So.2d 252, 255 (Miss. 1996); see also

4. The statute of limitations for claims accruing after July 1, 1998 adds tolling provisions for fraudulent concealment and instances when a foreign object is left in a patient's body. See MISS. CODE ANN. § 15-1-36(2)(a),(b). Both provisions require a plaintiff to bring an action within two years of the time when the alleged injury or fraud should have been discovered, and no later than seven years after the alleged act of neglect. See id.

First Trust Nat'l Ass'n v. First Nat'l Bank of Commerce, 220 F.3d 331, 336-37 (5th Cir. 2000); In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1031 (N.D. Miss. 1993).

Plaintiffs contend that they brought their actions within two years "from the date the alleged act ... with reasonable diligence might have been first known or discovered." Miss. CODE. ANN. § 15-1-36(1). According to plaintiffs, they could not have reasonably discovered their purported injuries until their alleged heart problems were diagnosed after reviewing their echocardiograms. Plaintiffs assert that their diagnoses occurred less than two years prior to filing their complaint. Wyeth counters that plaintiffs should have been on notice of their stated injuries as a result of the widespread publicity accompanying the withdrawal of the diet drugs from the market in September, 1997. Wyeth further contends that plaintiffs should have known about their alleged injuries at the very latest in March, 2000, after Wyeth's extensive publicity campaign.

This court also discussed in French supra, the massive publicity in Mississippi and nationwide concerning the withdrawal of the diet drugs from the market and their possible connection to valvular heart disease. See PTO No. 3281 at 7-12. We find that here, as in French, plaintiffs have not established that they discovered their alleged injuries less than two years prior to bringing their lawsuits. In light of this publicity, plaintiffs, through the exercise of reasonable diligence, should have discovered their alleged injuries at the very latest by

March, 2000. However, their complaints were not filed until June or November, 2002. Thus, plaintiffs' claims against the in-state physicians are clearly time barred, and Wyeth has established that these in-state physicians are fraudulently joined.

In response to Wyeth's contention that the statute of limitations has lapsed for claims against in-state physician defendants, thus barring all tort claims against in-state physicians, plaintiffs cite Robinson v. Singing River Hospital, 732 So.2d 204 (Miss. 1999). Plaintiffs rely on Robinson for the proposition that the statute of limitations begins to run against an in-state physician only when the plaintiff has knowledge of his injury and the link between said injury and the in-state physician's conduct. In Robinson, the plaintiff received second degree burns when heating pads were placed on his skin. The court determined that because the plaintiff was burned and complained of his injury almost immediately, it was disingenuous for him to assert that he was not aware of his injury until another physician advised him that he was in fact injured. The court in Robinson found that "where the symptoms are not immediately manifested, the cause of action does not accrue until the [plaintiff] is aware or should be aware of his condition." 732 So.2d at 208 (citations omitted) (emphasis added).

Similar to Robinson, the plaintiffs here allege that they could not have been aware of their injury until the link between their alleged injuries and the conduct of the in-state physician was revealed after reviewing their echocardiograms.